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No. 85

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF AMICUS CURIAE OF DANA ANDREW HILL

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INTEREST OF AMICUS CURIAE

Amicus Dana Andrew Hill stands indicted under the District of Columbia rape statute, D.C. Code § 22-2801. The District of Columbia rape statute reads:

> "Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the

> words 'with the death penalty,' in which case the punishment shall be death by electrocution: Provided further, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section." D.C. Code Ann. § 22-2801 (1967).

Amicus Hill moved the United States District Court for the District of Columbia to dismiss the indictment against him on the grounds that the statute on which the indictment is based is unconstitutional as violative of both the Sixth and Fifth Amendments of the United States Constitution. The motion was denied November 3, 1967. Amicus Hill has noted an appeal from this decision.*/

The District of Columbia rape statute is similar in its terms to the Federal Kidnaping Act.**/ The decision of this

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*/ Amicus believes he has a right to take such interlocutory appeal since otherwise he would suffer irreparable injury. DiBella v. United States, 369 U.S. 121 (1962). Stack v. Boyle, 342 U.S. 1 (1951).

**/ "Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise,

Court will perforce have a great effect on the final determination whether the District statute is unconstitutional. The Solicitor General of the United States, in his initial brief to this Court, indicated that if the Federal Kidnaping Act falls the District of Columbia rape statute is also vulnerable.*/

Amicus Hill, therefore, has a critical interest in the outcome of this case. Upon the Court's decision may rest his life. He consequently submits this brief as amicus curiae in support of Appellees Charles Jackson, John A. Walsh, and Glenn W.A. De La Motte.

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except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." 18 U.S.C. 1201(a) (1964).

*/ Brief of the Solicitor General, pp. 4-5

ARGUMENT

Amicus Hill does not intend to recount the appellees' discussions of the authorities which ably establish the principle that the exercise of a constitutional right may not be made costly.*/ Instead Amicus wishes to focus on the operation of the District of Columbia rape statute and by analogy and comparison assist this Court in its interpretation and evaluation of the Federal Kidnaping Act. Amicus would demonstrate to this Court how, by reason of the language of the statute, the decisions interpreting it, and the practice under it, the District statute impairs the free exercise of the right to jury trial and tends to coerce a guilty plea. Amicus would further point out that, although the District statute is more explicit and the alternatives under it more clearly drawn, the two statutes are essentially the same and demand similar interpretation.

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*/ Amicus would, however, point to that line of cases, not yet brought to the attention of this Court, which indicates that a waiver of the Sixth Amendment right to jury trial will not be accepted unless it is clear that the waiver is a free, express, and intelligent choice. E.g., Patton v. United States, 281 U.S. 276 (1930), Adams v. United States ex rel McCann, 317 U.S. 269 (1942). Certainly, in light of such precedent, a statute which places the risk of death on a defendant who chooses jury trial must be viewed askance.

The District statute declares that the death penalty shall be imposed only if the jury adds to their guilty verdict the words, "with the death penalty." If a defendant chooses jury trial the death penalty becomes a possibility. If he pleads guilty (or nolo contendere) or waives jury trial, he can be sentenced to no more than thirty years. The defendant, therefore, is posed a vexing alternative by the statute -- forego jury trial or risk death.

The alternative is a real one both in theory and in practice. Information obtained from the Administrative Office of the United States Courts, Division of Procedural Studies and Statistics, attached as Exhibit "A", indicates that out of 268 cases, arising under D.C. Code § 22-2801 for the fiscal years 1957-1966, the plea of guilty to the indictment (or nolo contendere) has been accepted in 26 cases, or 9.7 percent of the total number of cases. The same statistics show that trial has been had to the Court during these years in 28 cases, or 10.4 percent of the total number of cases under the statute.*/

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*/ Considering the greatly overloaded criminal docket in the District Court in the District of Columbia, it is to be expected that a judge, insofar as justice will permit, will desire to handle cases as expeditiously as possible. Resolution of a case by guilty plea or trial to the Court, therefore, is desirable from the standpoint of judicial administration.

These statistics remove the constitutional question from the realm of mere speculation and make it a live, practical problem requiring resolution.

Whether the statute is constitutionally infirm was first discussed by the United States Court of Appeals for the District of Columbia in Green v. United States, 40 U.S. App. D.C. 426 (1913).

> "Would a legislature have a constitutional right to penalize an accused person for pleading not guilty? . . . Could any court in such circumstances ever have any assurance that a plea of guilty was a voluntary plea? If a judge should say to the accused, 'If you plead guilty, I will give you a lighter sentence than I shall give you if you plead not guilty, and are convicted,' what would be the result? Any sentence passed upon a plea of guilty thus obtained would be set aside . . . . [I]f we hold that [Congress] has offered the accused a reward for pleading guilty, or threatened him with a severer punishment if he shall require the case to be proved against him, then we must hold that the provision is unconstitutional and void as violating the [Sixth] Amendment. . . . For how can one be said to be left in the free enjoyment of a jury trial

when the statute subjects him to a severer punishment on being found guilty by a jury than when he is adjudged guilty on his own plea?" 40 U.S. App. D.C. at 429-430.

However, rather than declare the statute unconstitutional, the Court gave it the tortuous interpretation of requiring a jury trial in every instance regardless of whether the defendant wished to plead guilty or have trial to the Court. The constitutional issue was thus avoided.

This interpretation robbed the criminal process of much of its flexibility. To remedy this flaw, Judge Holtzoff in United States v. Willis, 75 F. Supp. 628 (D.D.C. 1948) declared he felt the Green opinion should be limited to the precise issue involved*/ and held that a trial judge in his discretion could accept a plea of guilty under the statute.

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*/ The issue presented in Green was whether a defendant had a right to insist that his guilty plea be accepted. Willis concerned the question whether a judge had discretion to accept a guilty plea. Judge Holtzoff did not deal expressly with the constitutional issue. He did not fully consider the dilemma raised in Green that, if the defendant can plead guilty, the statute impairs the free exercise of his right to jury trial and tends to coerce a guilty plea.

Judge Holtzoff's opinion in Willis has held sway in the District of Columbia.*/ As the statistics prove, the district judges no longer require a jury trial in every instance but permit resolution of cases under the statute both by guilty plea and by trial to the Court. The constitutional dilemma laid to rest, albeit awkwardly, in Green has been resurrected. Resolution of the constitutional question is aided by a careful examination of the situation both when a defendant pleads guilty or pleads not guilty and waives jury trial, and when he chooses jury trial. Such examination demonstrates that the statute runs afoul of constitutional principles.

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*/ In McCoy v. United States, 363 F.2d 306 (C.A.D.C. 1966), the Court of Appeals approved, as a general proposition, the statement in Willis that, "[t]he power of a court to accept a guilty plea is traditional and fundamental. Its existence is necessary for the purpose of serving the practical ends of the administration of the criminal law." 363 F.2d at 307. There was no ruling in McCoy specifically concerning D.C. Code § 22-2801.

I. The Situation If The Defendant Pleads Guilty or Pleads Not Guilty and Waives Jury Trial

We have seen that rape cases in the District of Columbia are resolved in over 20 percent of all instances by a guilty plea or by trial to the Court. If a case is so disposed of, the risk of death is completely avoided.

Even if it may be possible, after a plea of guilty or a conviction on trial to the Court, for a judge to impanel a jury for sentencing purposes, it is clear beyond any doubt from the wording of the D.C. Code § 22-2801 that such jury cannot impose the death sentence. The District of Columbia rape statute says:

> "The jury may add to their verdict, if it be guilty, the words 'with the death penalty.'" (Emphasis supplied.)

The statute explicitly declares that only the jury which has rendered the guilty verdict may impose the death penalty. There would be no way for a jury impaneled only for sentencing to add to their verdict the words "with the death penalty." A jury impaneled only for sentencing under D.C. Code § 22-2801 has no power to order the death penalty.*/

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*/ Furthermore, as a practical matter, juries are not impaneled for sentencing under D.C. Code § 22-2801. No case where this has been done under this statute has been found.

The upshot of this discussion is that a plea of guilty or a request for trial to the Court is a very real way of avoiding the possibility of the death sentence under the District rape statute. If a guilty plea is offered, there is a good chance that it will be accepted. If trial to the Court is requested, there is a good chance

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In the Willis case, Judge Holtzoff quoted with approval from Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938), which declared that, concerning the Federal Kidnaping Act, a jury could be impaneled only for sentencing and could return a valid sentence of death. Judge Holtzoff went on to comment that, "No reason applies for placing a different interpretation on the parallel provisions in the local statute relating to rape and carnal knowledge and in the federal statute relating to kidnapping." 75 F. Supp. at 631. However, as just demonstrated there is a very good reason why a jury impaneled for sentencing under the District of Columbia statute cannot give the death sentence. The words in the statute simply do not permit it. Judge Holtzoff's dictum appears to be only a comment in passing and he does not specifically deal with the wording of the statute. This dictum should be compared with a statement made by Judge Holtzoff earlier in his opinion:

> "Consequently, by pleading guilty the defendant escapes the risk of being sentenced to death." 75 F. Supp. at 629.

that it will be granted. If either a guilty plea is accepted or trial to the Court granted, there is no possibility that the death penalty will result. The way to avoid the death penalty presented to the defendant is a real and viable one -- a lure to the defendant who, with justification, views jury trial with trepidation.

The Kidnaping Act, while not as explicit as the District of Columbia rape statute, requires a similar interpretation. The Kidnaping Act speaks of the "verdict of the jury," clearly indicating that only the jury which has determined guilt can recommend the death sentence.

II. The Situation If The Defendant Chooses Jury Trial

On the other hand, the defendant has the alternative of choosing jury trial. But if he does, there is always the possibility that the jury can impose the death penalty.

If the death penalty is imposed by the jury, the trial judge has no discretion under D.C. Code § 22-2801 to upset the sentence. The statute says:

> "Provided, that in any case of rape the jury may add to their verdict if it be guilty, the words 'with the death penalty,' in which case the punishment

shall be death by electrocution." (Emphasis supplied.)

The conclusion that the trial judge has no power to mitigate the death sentence under this statute is further compelled by the language of several cases concerning D.C. Code § 22-2801. In Tatem v. United States, 190 F.2d 612 (C.A.D.C. 1951), the Court of Appeals said:

> "The death sentence . . . was within 'the sound discretion of the jury and of the jury alone.'" 190 F.2d at 618.

In Williams v. United States, 131 F.2d 21 (C.A.D.C. 1942), the Court said:

> ". . . [D]efendant's counsel was at a loss to understand why upon this set of facts the jury returned the death penalty. Many persons probably would not have done so. This jury did. Congress has seen fit to give that power to the jury. There is nothing a trial or appellate court can do to reverse its judgment in inflicting the death penalty when there is sufficient evidence to support a verdict of guilty." 131 F.2d at 22.

Judge Holtzoff, in United States v. Willis, supra, came to the same conclusion:

> "If the jury so recommends, it becomes mandatory on the court to impose a death penalty." 75 F. Supp. at 629.

As the cases demonstrate, if the defendant chooses jury trial he throws himself on the mercy of the jury and the jury alone concerning the death sentence. The trial judge has no discretion to tamper with a death sentence. The trial judge's discretion having been removed, the hazard of requesting jury trial becomes greater. Consequently, the impairment of the defendant's free exercise of his constitutional right to jury trial and the tendency to coerce a guilty plea are even more pronounced.*/

It is again apparent that the language of the statute and the case law pertaining thereto in regard to the judge's discretion to mitigate the death sentence are clearer concerning the District rape statute than in regard to the Federal Kidnaping Act. But it strains the language of the Kidnaping Act to place a different interpretation on it than that compelled by both language and decision concerning the District statute. The Kidnaping Act says "shall be punished" and the word "recommend" does not ameliorate the mandatory character of the statute. The import of the

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*/ The defendant's reticence in choosing jury trial will be heightened when he realizes that individuals with scruples against capital punishment often will be disqualified from jury duty and that, consequently, he is likely to get a "hanging jury" -- i.e., one composed of persons having no reluctance to imposing the death sentence.

Act as a whole is that the jury which imposes death has the final word. The life of the defendant is subject to jury fiat.

CONCLUSION

The language of the District of Columbia rape statute and the decisions and practice concerning it are instructive in considering the constitutionality of the Federal Kidnaping Act. The two statutes are essentially the same and should receive similar interpretations. Both statutes present a defendant with a treacherous choice -- a choice "between the rock and the whirlpool"*/ - which makes costly the exercise of constitutional rights. Both statutes violate the Sixth and Fifth Amendments of the United States Constitution.

Amicus asks this Court to declare the Federal Kidnaping Statute unconstitutional and to do so in terms which indicate that the District of

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*/ See Garrity v. New Jersey, 386 U.S. 493 (1967).

Columbia rape statute also exceeds the bounds of constitutional permissibility.

Respectfully submitted,

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EXHIBIT A

United States District Court for the District of Columbia

Criminal Defendants Disposed of for Violations of Title 22, D.C. Code, Section 2801 (Rape), by Type of Disposition, Fiscal Years 1957 thru 1966

Fiscal year	Total defendants	Total not convicted	Dismissed	Acquitted by Court	Acquitted by Jury	Total convicted	Plea of guilty or nolo contendere	Convicted by Court	Convicted by Jury
1957	19	11	8	-	3	8	4	-	4
1958	14	9	8	-	1	5	3	1	1
1959	25	18	6	-	12	7	3	-	4
1960	30	20	6	4	10	10	3	-	7
1961	27	23	7	6	10	4	1	-	3
1962	32	20	12	3	5	12	2	-	10
1963	22	6	6	-	-	16	4	1	11
1964	35	23	13	3	7	12	5	2	5
1965	33	31	23	5	3	2	-	-	2
1966	31	23	11	3	9	8	1	-	7

Source: Administrative Office of the United States Courts
Division of Procedural Studies and Statistics, Sept. 20, 1967.